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Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
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**In Re: Complaint of Discount Communications against BellSouth
Telecommunications
Docket No. 00-00230**


Dear David:

Please find enclosed the original and thirteen copies of Discount Communications, Inc.'s Post-Hearing Brief in the above-captioned proceeding. Copies have been forwarded to parties.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


Henry Walker

HW/nl
Attachment

POSTED
5-15-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: COMPLAINT OF DISCOUNT)
COMMUNICATIONS, INC.) Docket No. 00-00230
AGAINST BELL SOUTH)
TELECOMMUNICATIONS, INC.)

POST-HEARING BRIEF OF DISCOUNT COMMUNICATIONS

Discount Communications, Inc. ("Discount") submits the following post-hearing brief in support of Discount's complaint against BellSouth Telecommunications, Inc. ("BellSouth").

The "State Credit" for Lifeline Service

I. BellSouth has violated the federal Telecommunications Act, the rules of the Federal Communications Commission, and the terms of its resale agreement by charging Discount Communications a wholesale rate for "Lifeline" telephone service that is higher than the rate BellSouth charges its own end users for the same service. BellSouth must therefore reimburse (or credit) Discount for all charges collected in violation of federal law and the parties' interconnection agreement.

BellSouth charges \$6.15 per month to BellSouth's Lifeline subscribers in the Memphis area but charges Discount a wholesale rate of \$7.55 for the same service. *See* Exhibit 10.¹ The reason for this disparity is that BellSouth gives its own end users a "state credit" of \$3.50

¹ These amounts do not include various add-ons such as taxes, franchise fees, and (continued...)

per month. *See* BellSouth's Lifeline tariff, Section A3.31.3B.(2), contained in Exhibit 1. BellSouth does not, however, include that "state credit" in the wholesale price charged to resellers such as Discount. *Id.*, at Section A3.31.2A8.

Under controlling federal law and the parties' interconnection agreement, BellSouth has overcharged Discount by refusing to include the \$3.50 state credit in BellSouth's wholesale rate.

A. The federal Telecommunications Act requires BellSouth "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers." 47 U.S.C. § 251 (c)(4)(A). The Act also prohibits BellSouth from imposing "unreasonable or discriminatory conditions or limitations" related to the resale of service. 47 U.S.C. § 251(c)(4)(B).

The Act goes further. For purposes of implementing Section 251(c)(4), the Act requires that "a state commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to . . . costs that will be avoided by the local exchange carrier." 47 U.S.C. §252(d)(3), emphasis added. In other words, the Tennessee Regulatory Authority "shall" fix BellSouth's wholesale rate for Lifeline service "on the basis of the retail rates" charged by BellSouth to its own Lifeline subscribers, less avoided costs.

B. The FCC's rules implementing the resale provisions of the Act reiterate these statutory requirements. "The wholesale rate . . . shall equal the incumbent LEC's existing retail

¹(...continued)
charges for number portability.

rate for the telecommunications service, less avoided retail costs.” 47 C.F.R. § 51.607(a). To eliminate any unreasonable or discriminatory conditions which might be attached to a carrier’s wholesale service, the FCC rules also state that “A LEC must provide services for resale that are equal in quality [and] subject to the same conditions . . . as the LEC provides these services to others, including end users.” 47 C.F.R. §51.603, emphasis added. Thus, BellSouth must offer wholesale service to Discount that is “subject to the same conditions” as the service BellSouth offers to its own end users.

C. Along with these rules, the FCC has also issued Orders explaining that the resale rules apply to all LEC services, including “below-cost and residential” services and, specifically, Lifeline services.

In the “Local Competition Order,” Docket 96-325, issued in August, 1996, the FCC noted that many LECs opposed “requiring, or even allowing resale of below-cost services.” Paragraph 954. But, the agency held, “simply because a service may be priced at below-cost levels does not justify denying customers of such a service the benefits of resale competition.” Paragraph 956. The FCC explained that the resale pricing standard contained in the federal Act “gives the end users the benefit of an implicit subsidy in the case of below- cost service, whether the end user is served by the incumbent or by a reseller. *Id.*, emphasis added. Finally, the agency noted, the LEC should be financially indifferent to offering a below-cost service at retail or wholesale rates since any loss of revenue resulting from the resale of below-cost service would be offset by a proportionate savings of avoided costs. *Id.*

In the “Universal Service Order” (Docket 97-157, issued in May, 1997), the FCC explained specifically how the agency’s rules and decisions on resale applied to Lifeline service. The agency again noted that the “Local Competition Order” required that all retail services must be available for resale at the LEC’s “retail rate,” *i.e.* the rate offered to end users, less avoided costs. Therefore, the agency concluded, resellers “could obtain Lifeline service at wholesale rates that include the Lifeline support amounts and can pass these discounts through to qualifying low-income customers.” Paragraph 370, emphasis added. Once again, the FCC made it very clear that BellSouth’s wholesale rate must “include the Lifeline support amounts,” such as the \$3.50 state credit, so that the end user will receive the benefit of the state credit whether he receives service from BellSouth or from Discount.

Federal law thus plainly requires that BellSouth include the \$3.50 state credit in its wholesale rates for Lifeline service. Furthermore, the Act requires the TRA, in reviewing and approving a resale agreement, to insure that BellSouth’s wholesale rates are consistent with these federal requirements. 47 U.S.C. §252(d)(3) and § 252(c)(2)(B).

Presumably in order to comply with these federal rules,, Section IV B of the resale agreement between Discount and BellSouth specifically provides, “Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual end users of the Company in the appropriate section of the Company’s Tariffs.” Late-filed exhibit 18. This language is obviously intended to mirror the “same conditions” language in FCC rule 47 C.F.R. § 51.603. Section IV B of the resale agreement is therefore consistent with the federal Act and with the FCC’s rules on resale.

In sum, the federal Act, the FCC's rules and Orders, and Section IV B of the resale agreement all require BellSouth to offer Lifeline service to Discount at the "retail rate," less avoided costs, and "subject to the same conditions," including "Lifeline support amounts," that BellSouth offers to its own end users. There is no doubt whatsoever that BellSouth has illegally overcharged Discount for Lifeline service in violation of federal law and the parties' agreement.

In the face of this redundant and controlling legal authority, BellSouth claims, first, that the company's "retail" rate for Lifeline service is not the price charged to end users but the non-Lifeline rate of \$12.15 (plus \$1.00 for Touch tone). Tr. 586-587. BellSouth witness Mrs. O'Bannon testified that, in her view, the "retail rate" for Lifeline service is \$13.15 and that the "state credit" (tr. 563) represents "a credit off the bottom line of the bill," not a reduction in the retail price. Tr. 587.

In light of the FCC's explicit holding that resellers are entitled to purchase Lifeline service at the LEC's retail rate, less the avoided discount, and that the resulting wholesale rate "includes the Lifeline support amounts," the witness's explanation is not credible. Furthermore, Mrs. O'Bannon's frank admission that she had never read the FCC's rules on resale (tr. 585-587) prior to taking the witness stand should persuade the Authority to give no weight to her testimony on that point.

Second, BellSouth contends that, notwithstanding federal law or the language in the resale agreement, BellSouth is not required to include the state credit in its wholesale Lifeline rate because BellSouth's current intrastate tariff states that resellers are not entitled to that credit. That the recently amended tariff is inconsistent on its face with federal law and Section IV B of the

parties' interconnection agreement is apparently of little concern. The company's pre-hearing briefs make no effort to reconcile these contradictory provisions.²

² To further confuse matters, the resale agreement also contains language in Exhibit B, footnote 4, which conflicts both with Section IV B of the agreement and with BellSouth's current tariffs. The footnote states that, if Discount wishes to offer Lifeline service, Discount "shall purchase BellSouth's Message Rate Service" at the tariff rate, less the wholesale discount. The footnote also requires Discount to resell BellSouth's Message Rate Service at "a discount which is no less than the discount BellSouth now provides" to Lifeline customers. Finally, the tariff states that Discount is responsible for recovering any federal, Lifeline support from the National Exchange Carriers Association.

At the time BellSouth and Discount signed the resale agreement, however, in March, 1998, these provisions in footnote 4 were inapplicable, obsolete, and had been superseded by federal law. Under the circumstances, neither party complied with the footnote.

Three months before the agreement was signed, BellSouth amended its Lifeline tariff in order to comply with the FCC's "Universal Service Order." See Exhibit 1. Instead of offering discounted Message Toll Service to Lifeline customers, BellSouth began offering them regular, flat-rate service that included both the \$3.50 state credit and a \$7.00 federal credit. As an "eligible telecommunications carrier," BellSouth collected the federal credit from an interstate, universal service pool established by the FCC. Universal Service Order, *supra*, paragraph 368. But since resellers like Discount can supposedly obtain Lifeline service at wholesale rates that already "include the Lifeline support amounts," the FCC held there was no reason to make resellers eligible for federal reimbursement. *Id.*, at paragraph 370. In other words, the requirements of footnote 4 were inconsistent with the Universal Service Order which had been issued six months earlier.

In a letter to the TRA dated September 9, 1999, BellSouth acknowledged that both footnote 4 in the resale agreement and language in BellSouth's Lifeline tariffs "have been superseded by the Universal Service Order." BellSouth agreed to "updating Note 4 of its resale agreements" and amending the inconsistent portions of its Lifeline tariffs. (A copy of this letter is attached as Exhibit 2 to BellSouth's "Reply Brief," filed April 7, 2000.)

BellSouth did, in fact, propose to amend the language in footnote 4 of the Discount agreement. As amended, the footnote would have merely required that Discount only offer Lifeline service to qualified, low income subscribers and would no longer have been inconsistent with federal law or Section IV B of the agreement. Discount apparently did not respond to the proposed amendment. See Exhibit 3 attached to BellSouth's Reply Brief and also page 8, footnote (continued...)

The answer, of course, is obvious. When a state tariff conflicts with the federal Telecommunications Act or the FCC's rules on interconnection agreements, federal law prevails. *See AT&T Corp. v. Iowa Utilities Board*, 1199 S.Ct. 721, 927-733 (1999). There is no serious argument that BellSouth can evade its federal, resale obligations by filing an inconsistent, intrastate tariff or that the TRA can enforce a state tariff that conflicts with — and is preempted by — federal law.³

At bottom, this case is no different than any other complaint to enforce an interconnection agreement. Based on the parties' agreement and controlling principles of federal law, BellSouth has overcharged Discount for Lifeline service. To the extent BellSouth's intrastate tariffs hold otherwise, the tariffs are of no effect.⁴ BellSouth must therefore reimburse (or credit)

²(...continued)
5 of the brief.

BellSouth also amended its Lifeline tariff, effective November 8, 1999, to "Clarify" language pertaining to the resale of Lifeline service. *See* Exhibit 4 of BellSouth's Reply Brief.

It is that, recently amended tariff which BellSouth now argues supersedes both federal law and Section IV of the resale agreement. But BellSouth's own actions seem to acknowledge that neither footnote 4, which has never been observed by either party, nor BellSouth's recently amended, intrastate tariff can be enforced if it is inconsistent with federal law concerning interconnection agreements and resale requirements.

³ *See Public Utilities Commission of California v. United States*, 78 S.Ct. 446 (1958) in which the Court held that federal regulations promulgated by the Dept. of Defense preempted inconsistent state tariffs regulating motor carriers.

⁴ In the recently concluded NEXTLINK arbitration proceeding (Docket No. 98-00123), BellSouth similarly argued that the TRA could not require BellSouth to offer "multiple tandem access" to NEXTLINK because such an offering would be inconsistent with BellSouth's intrastate tariffs. In reply, NEXTLINK pointed out that arbitrated interconnection agreements routinely include provisions that are not found in, or are inconsistent with, BellSouth's intrastate
(continued...)

Discount for \$31,745 which is the amount of state Lifeline credits Discount would have received if BellSouth had offered wholesale service to resellers under the “same terms and conditions” as it offers to its own end users.

The “Subsidy” Issue

II. During the hearing, the parties and the Directors devoted considerable time to the issue of whether the \$3.50 state credit paid to BellSouth’s Lifeline customers is implicitly recovered from BellSouth’s general customer body. Discount witness Archie Hickerson testified, without contradiction from BellSouth, that the cost of funding the state credit was built into BellSouth’s annual revenue requirement during the carrier’s last rate case in 1993 and, therefore, BellSouth’s current rates assume recovery of the Lifeline credit from other retail customers. Tr. 138-139, 170-173. Even Mrs. O’ Bannon agreed with Mr. Hickerson that, in Tennessee, the Lifeline state credit is generated “through the state [rate] regulation process.” Tr. 620.

Thus, the costs of Lifeline are paid, not only by BellSouth’s customers but also by the customers of every reseller who, by purchasing BellSouth’s service, is effectively picking up a share of the costs of supporting Lifeline. In other words, since BellSouth’s retail rates are slightly higher than they would otherwise be — in order to generate the state Lifeline credit -- any retail

⁴(...continued)

tariffs (such as extended loops and provisions for liquidated damages) and that an interconnection agreement properly approved under the federal Telecommunications Act necessarily overrode any contrary provisions in BellSouth’s tariff. Brief of NEXTLINK filed Jan. 18, 2000. At a public meeting on March 28, 2000, the TRA agreed with NEXTLINK and ordered BellSouth to provide multiple tandem access.

or wholesale customer who buys that service would also be paying a premium to support Lifeline.⁵

At bottom, though, none of this is determinative in this proceeding. From the beginning, these concerns were raised by BellSouth in an effort to show it would somehow be “unfair” for the TRA to make BellSouth pass on the \$3.50 state credit to wholesalers as federal law requires. In light of the testimony of Mr. Hickerson and Mrs. O’Bannon, however, the factual foundation on which those claims rested has melted away.

Directory Assistance

III. The parties’ resale agreement explicitly provides that, as long as Discount continues to pay a wholesale discount of 16%, Discount is entitled to intrastate, directory assistance. BellSouth cannot, through a state tariff filing, override the terms of that agreement.

In March, 1998, when BellSouth and Discount signed their resale agreement, BellSouth did not charge end users for intrastate directory assistance. At that time --- indeed, since the beginning of telephone regulation in Tennessee --- BellSouth offered unlimited access to directory assistance as part of the company’s basic local exchange service. Although the TRA had approved a directory assistance charge for Sprint/United in May, 1997, the TRA’s decision had been appealed to the Court of Appeals, and BellSouth had not even filed a tariff to charge customers for directory assistance.

⁵ For a further explanation of how resellers contribute to Lifeline support, see Exhibit 11, a 1997 arbitration decision issued by the Mississippi Public Service Commission, Panel Report, pp. 4-5.

The resale agreement signed by the parties does not contain any rate for directory assistance charges. It does, however, contain the following language concerning the wholesale discount rate to be paid by Discount for BellSouth's services:

"The Wholesale Discount [16%] is set as a percentage of the tariffed rates. If OLEC [other local exchange carriers, *i.e.* Discount Communications] provides its own operator services and directory services, the discount shall be 21.56%. These rates are effective as of the Tennessee Regulatory Authority's Order in Tennessee Docket No. 90-01331 [*sic.*] dated January 17, 1997."

As discussed further below, Discount interpreted that language in the agreement to mean that Discount may either (1) provide its own directory assistance and operator services and pay a cheaper rate for other telephone services or (2) obtain directory assistance and access to operators services from BellSouth and thereby pay a higher rate for other telephone services. In other words, Discount understood that the 16% discount rate included BellSouth's directory assistance services and that the 22.56% rate excluded BellSouth's directory assistance. The difference between 16% and 22.56% represented the "price" of directory assistance and access to operator services.

Three months after the parties signed the agreement, BellSouth filed a tariff to begin, for the first time, charging customers for directory assistance. The TRA approved the tariff in July and the tariff became effective in September, 1999. The issue of whether directory assistance is a "basic service" under state law and whether BellSouth may legally impose a charge for that service is still pending before the Court of Appeals.

Because of the language of the resale agreement, interpreted in light of “the state of the law as it existed at the time the [Agreement] was entered into,” ⁶ BellSouth’s subsequent decision to begin charging Discount for directory assistance is a clear violation of the agreement

From the nature of the pre-pay telephone business, it is self-evident that Discount Communications would not have agreed to a resale contract which allowed BellSouth to charge Discount for directory assistance calls made by Discount’s customers. Because Discount’s customers generally have poor credit and, for that reason, are unable to obtain service from BellSouth, Discount collects payment prior to providing each month’s service. The payment, of course, must be equal to the cost of providing service. If BellSouth is subsequently allowed to amend the resale agreement and to begin charging Discount for directory assistance calls without any limitation, Discount obviously cannot continue providing service.

Discount Communications believes that the language of the resale agreement clearly provides that as long as Discount accepts the lower, wholesale discount of 16%, the reseller is entitled to access BellSouth’s directory assistance and operator services and that directory assistance would be included in the purchase of BellSouth’s local service. To the extent the language in the agreement is ambiguous, Discount’s president Edward Hayes testified concerning his understanding of the agreement. Tr. 250-263, 260-261. Given the nature of the pre-pay telephone business, he explained that Discount would never have agreed to allow BellSouth to begin charging for directory assistance without any provision for blocking such calls. Tr. 260.

⁶ *Petition of Brooks Fiber*, TRA Docket 98-00118, Initial Order of Hearing Officer, issued April 21, 1998 (affirmed on August 17, 1998), at page 11.

He said Discount was "blind sided," five months after the agreement was signed, with virtually unlimited financial exposure caused by customers making directory assistance calls. Tr. 261. Had Discount believed that BellSouth could materially change the parties' agreement through a subsequent tariff filing, he testified that Discount would either have re-negotiated the agreement or filed an arbitration petition with the TRA under the federal Telecom Act. Tr. 260, 345-346.

There is no testimony in the record from any BellSouth witness concerning the negotiations with Discount or BellSouth's understanding of the agreement.

Had Discount sought arbitration, the TRA could have considered the impact of directory assistance charges on Lifeline customers. Among the solutions the agency might have imposed are:

- a. A more explicit provision in the agreement prohibiting BellSouth from charging Discount for directory assistance during the life of the agreement.
- b. A feature that blocks directory assistance after six calls. Directory assistance is the only usage-sensitive feature which BellSouth is unable to block (unless the customer also elects to block all long distance calls). Tr. 486-488.⁷

⁷ Based on the record developed in this case, the TRA could immediately direct BellSouth to begin providing free directory assistance to all Lifeline customers until such time as BellSouth is able to offer toll blocking that does not also block access to directory assistance service.

As Mrs. O'Bannon noted, the FCC requires that Lifeline customers have access to directory assistance. Tr. 556. Nevertheless, she acknowledged that BellSouth requires some Lifeline customers to pay a deposit of as much as \$75 in order to obtain access to toll and directory assistance services. Tr. 556-563. Unless the customer makes a deposit, BellSouth blocks access to both services.

(continued...)

c. Pending BellSouth's development of a blocking feature, free directory assistance for qualified Lifeline customers. See footnote 7, *supra*.

These issues will presumably arise should the parties request arbitration of a new resale agreement.⁸

In approving the resale agreement between Discount and BellSouth, the TRA Directors have exercised the federal authority delegated to them under the Telecommunications Act. Backed by the preemptive authority of federal law, the provisions of an agreement approved pursuant to the Act necessarily override any conflicting language in BellSouth's intrastate tariffs. See footnote 4, *supra*. Therefore, if the TRA concurs with Discount's interpretation of the parties existing agreement, nothing in BellSouth's subsequently approved directory assistance tariff applies to Discount for the duration of the agreement.

If, for example, an interconnection agreement provides for the payment of reciprocal compensation for local calls at a rate fixed in the agreement, BellSouth may not amend that agreement by filing an intrastate tariff which provides for a different rate. Otherwise, the arbitration process would be largely meaningless.

⁷(...continued)

Despite Mr. O'Bannon's explanation that "it is a choice that [the customers] are making" not to put up a deposit (tr. 558), it seems obvious that BellSouth's deposit requirement is inconsistent with the FCC's rule requiring that directory assistance be available to Lifeline customers.

⁸ The current agreement is scheduled to expire in March 2001. BellSouth and Discount have also signed a new agreement based on the assumption that Discount would become a facilities-based CLEC. Since Discount no longer intends to become a CLEC, the new agreement appears moot. Tr. 363-365.

In sum, the directory assistance issue, like the "state credit" question, turns on an interpretation of the parties' resale agreement in light of the regulatory landscape that existed at the time the agreement was signed. If the TRA determines that the parties agreed that Discount could obtain access to BellSouth's directory assistance and operator services in exchange for accepting the lower, 16% wholesale discount, BellSouth cannot unilaterally amend that agreement through an intrastate tariff any more than BellSouth could change the wholesale discount itself simply by filing a tariff. BellSouth must therefore reimburse (or credit) Discount for \$23,086.65 in directory assistance charges.


Conclusion

IV. For these reasons, Discount asks that the resale agreement be enforced, according to its terms and in a manner consistent with controlling federal law, and that BellSouth be directed to reimburse (or credit) Discount for the amounts stated above.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U. S. First Class Mail, facsimile, and/or hand delivery, to the following on this the 12 th day of April, 2000.

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